THE LEGACY OF 1776 IN LEGAL AND ECONOMIC THOUGHT

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SHORTLY after this nation celebrated its one hundredth anniversary, Henry George wrote *Progress and Poverty,* which he dedicated "To Those Who, seeing the Vice and Misery that Spring from the Unequal Distribution of Wealth and Privilege, Feel the Possibility of a Higher Social State, and Would Strive for its Attainment."[1]

George was the first in a series of American idealists who over the past hundred years have vainly protested against the "unequal distribution of wealth and privilege" and "the vice and misery" that it produces. But, oddly enough, in America he was the first. While there had been many reformers and radicals during the first hundred years of our national history, none had ever insisted before that there was an inevitable link between economic inequality and social injustice.

The century between the Declaration of Independence and the writing of Henry George represents a gigantic transformation in the American ideal of social justice. It reflects both the final exhaustion of the social ideals of the American Revolution and the beginnings of modern efforts to deal with the problems of achieving justice under industrial capitalism.

What had brought this first chapter in the American story to such a dramatic close? What were the differences between the social ideals and social realities of the revolutionary generation and those of George's contemporaries one hundred years later?

The one thing about which the revolutionary generation was in virtually unanimous agreement was in its opposition to any program of social and economic equality. Though there were such strands in the thought of Thomas Jefferson, as Professor Katz noted in his lecture on Jefferson,[2] they were clearly overshadowed by a far more pervasive commitment to the ideal of equality of opportunity.

What were the origins of the revolutionary ideal of equality of opportunity and why did it begin to meet increasingly bitter opposition one hundred years later?

[1] Henry George, Progress and Poverty: An Inquiry into the Cause of Industrial Depression (1879).

[2] Stanley N. Katz, 19 J. Law & Econ. 467 (1976).

The American revolutionary generation was part of a more general international liberal reaction against the economic and political premises of eighteenth century mercantilism. In both England and America, a system of state control and regulation of the economy was attacked for its corruption, its fostering of a bloated, patronage-hungry bureaucracy, its strong disincentives to individual initiative, and its perpetuation of feudal and aristocratic property arrangements. The triumph of Liberalism in early nineteenth-century England freed the commercial and industrial classes from the increasingly burdensome restraints of a paternalistic state apparatus and also freed them to engage in unmitigated exploitation of the lower classes, who had formerly received some measure of protection, however imperfect, from the state.

In the more benevolent and underdeveloped environment of America, however, Liberalism was able to express its most noble and idealistic face. With the bitter exception of slavery, there was substantially more equality and, even more important, infinitely greater opportunity for social mobility in America than in any other country in the world. It was possible, therefore, to establish a relatively just social order on the principle that the removal of artificial or hereditary restraints on opportunity would allow all to participate in the promise of American life. In this land of abundance, if all were allowed to begin the race at the same starting point, we would not trouble too much over the fate of losers.

As part of this abstract commitment to the ideal of equality of opportunity, there remained an almost paranoid fear of the threat of substantive equality. Nowhere more often than in this most politically democratic country in the world did the political elite express the fear that equality of opportunity was in constant danger of being overwhelmed by the leveling impulse. No theme is more pervasive in the political thought of America than the constant fear of redistribution of wealth or, as it was called, of tyranny of the majority. The entire structure of legal and political ideas and institutions that emerged from the American revolution was devoted to erecting barriers that would prevent the redistribution of wealth and would assure that accumulations of wealth by the shrewd, the calculating, the ambitious, and the able would be protected. But equality of opportunity meant, in practice, that the inevitable resulting inequalities would be protected and perpetuated by law.

What were the legal conceptions that reflected these underlying economic and political commitments? At bottom was the idea that the institutions of the state had no right to redistribute wealth. Thus, the basic doctrines of early American constitutional law establishing vested property rights, opposing retroactive laws, and requiring that laws, especially the laws of taxation, be general and uniform were all devoted to restricting and hedging in the redistributive impulse. Perhaps of still greater importance, the Separation of Powers Doctrine, with its sharp distinction between legislation and adjudication, was designed to prevent legislative interference in the determination

of individual cases. Legislation was acknowledged to be "political" and hence needed to be restrained by constitutional provisions. Adjudication, on the other hand, was earnestly declared to be nonpolitical. It was said to involve only a determination of the rights of individual parties before a court. In the language of the day, determination of individual controversies represented reason and not will.

If the dominant theme in postrevolutionary political ideology is the threat of legislative tyranny of the majority, the dominant theme in its legal ideology is the effort to establish the nonpolitical character of the judicial process. For if, as the leaders of the Codification Movement of the 1820's and the 1830's maintained, the common law process was inherently political, then it ought to derive its legitimacy from democratic legislation. And if even the judicial process required the application of inherently political legal standards, could there be any remaining barrier to using law to bring about the redistribution of wealth?

Just as constitutional law created legal barriers to legislative redistribution, orthodox legal thought in general created a series of intellectual barriers to the use of the judical process to advance egalitarian ends. What were these?

The essential structure of legal thought that emerged out of the American Revolution—though it had earlier roots in seventeenth-century English constitutional struggles—emphasized a series of basic dichotomies—between law and politics, ends and means, substance and procedure, processes and consequences. Recalling Sir Edward Coke's glorification of the "artificial reason of the common law" against the "natural reason" of the layman, these dichotomies enshrined in American legal thought what one writer has aptly called a legalist mentality.

The economic and political ideals of the American Revolution also emphasized a process-oriented conception of social justice—expressed by the phrase "equality of opportunity." At the same time, in both legal and political thought, the revolutionary generation uniformly denounced a substantive or consequentialist ideal of social justice represented by the competing ideal of equality of condition. A result-oriented jurisprudence, with its dangerous egalitarian potential, was thus regarded as contrary to the rule of law.

How did these ideals lead directly to the creation of a legalist mentality? In contract law, for example, early nineteenth-century legal doctrine was radically transformed to obliterate strong traces of an earlier tradition which looked to the substantive outcome of a bargain to determine whether it was fair. Instead, legal doctrine moved more and more in the direction of tolerating any outcome—however unjust it might have been thought to be—that resulted from a bargain entered into with the appropriate formalities. Courts, in short, turned to means, and away from ends, in determining the justice of a bargain.

There were many other areas of the law in which a process-oriented

conception of justice began to replace earlier doctrines that had taken account of the substantive character of legal and economic consequences. Legal doctrine, in short, was responding to the basic premises of revolutionary political theory expressed by the notion of Separation of Powers. For the doctrine of Separation of Powers was premised on the possibility of establishing a coherent distinction between legislation and adjudication, which in turn responded to the desire to create a radical separation between law and politics. Unless law could be rendered nonpolitical—at least that portion of law administered by common law courts—there would be no way to assure that redistributive impulses could be contained.

The legalist mentality was thus one of the most powerful intellectual contributions of the postrevolutionary generation towards creating the appearance of a politically neutral system of legal thought. It legitimized the notion that the problem of substantive inequality was outside of the proper sphere of the law. And more than anything else it laid the foundations for an enormous intellectual schism between the revolutionary ideal of the rule of law—of a government of laws and not of men—and substantive conceptions of social justice.

But there were other powerful currents in early nineteenth-century America which almost immediately began to subvert these legal and political ideals. Beginning in the 1790's, the goal of economic growth began totally to capture the imagination of Americans. And, as I will attempt to demonstrate, it was not at all easy to maintain a conception of a neutral, nonpolitical law amid the widespread desire to use law to facilitate economic growth. In short, from the beginning of the nineteenth century, the American elite was forced to choose between a legalist intellectual structure that stood as an important barrier to the redistribution of wealth and a consequentialist, efficiency-oriented, instrumental conception of the law which undermined that structure in the interest of economic development. It was at this point that the individualist, natural rights presuppositions of revolutionary legal thought confronted a collectivist and positivist mentality of those who in the nineteenth century wished to harness the law to the goal of increasing the Gross National Product.

Before I generalize still further, let me try to be somewhat more concrete. One of the ideas in which the revolutionary generation deeply believed was the familiar Lockean conception that property was a presocial right that existed normatively prior to the state. Property was not the creature of the state; indeed, the state existed to enforce and protect these preexisting natural rights. Similarly, legal rules did not create property rights. Rather, the function of legal rules was simply to reflect the presocial definition of property. This of course meant that redistribution of property by the state was a violation of natural right.

From early in the nineteenth century, this conception began to be systematically undermined. Is there any better example of the social creation of

property than the chartering of business corporations beginning in the 1790's? Those who have spent so much time correctly analyzing the effect of decisions like the *Dartmouth College Case*[3] in promoting corporate enterprise have nevertheless missed its deeper significance. None of the judges in that case ever doubted that the corporation was a creation of positive law. Chief Justice Marshall, for example, acknowledged that the corporation was an "artificial being." And, as Justice Story recognized in his opinion in that case, what the state has created, it can also take away, if only it makes this clear in the original act of creation. Light years, in short, stood between the natural rights conception of property that the Founding Fathers espoused and the conception of property as a social creation that the business corporation required.

Later, the underlying logic of the positivization of property rights was carried one step further in the *Charles River Bridge Case*[4] in which the Supreme Court refused to find any right to prevent the erection of a second, competitive bridge by virtue of a state charter granted earlier to another bridge company. Little did it seem to matter that, for several hundred years, the common law itself had recognized such a property right. In America, said Chief Justice Taney, we look to the instrument created by the state and not to some prelegal notion of property to determine what privileges are conveyed to property holders. Moreover, both sides in the Supreme Court were almost exclusively concerned with the effects that one or the other definition of property would have on the encouragement of economic growth. In the end, the Supreme Court authorized a redefinition of property rights to encourage competitive development. The debate over competing definitions of property rights thus turned almost completely on utilitarian and consequentialist considerations.

Could the system of adjudication any longer sustain its claim to render a nonpolitical judgment according to the natural rights of the parties? Or was the revolutionary ideal of the rule of law already about to be overwhelmed by the fact that every legal redefinition of property rights in the interest of economic development inevitably entailed a corresponding redistribution of wealth?

Let us take another example. In 1827 in the case of *Ogden v. Saunders*,[5] the Supreme Court by a four-three vote upheld state insolvency statutes that prospectively operated to discharge debts. In one of the last pure expressions of revolutionary natural rights philosophy before the Civil War, Chief Justice Marshall dissented on the ground that all state bankruptcy statutes represented an unconstitutional interference with the natural right to con-

[3] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[4] Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

[5] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827).

tract. A majority of the Supreme Court, however, saw the question differently. Since the enforceability of contracts, they insisted, was dependent on the state, contracts could be enforced only after incorporating any conditions which the state had previously imposed. The very definition of the obligation of contract, they made clear, was a social, not a presocial, creation, and it could only be established by positive law.

These are only several dramatic examples of the ways in which solutions to the problem of economic growth in an increasingly commercial and industrial society eroded the natural rights framework of the revolutionary generation's conception of law. Let me now offer a series of other examples to show the erosion of natural rights in the face of a result-oriented jurisprudence designed to promote economic growth.

The requirement of just compensation for eminent domain takings by the state is one of the clearest examples of the natural rights philosophy at work. Yet in the interest of promoting economic growth, courts during the second quarter of the nineteenth century created a whole series of exceptions to the obligation to compensate for indirect or consequential injuries inflicted by state chartered turnpikes, canals, and railroads. The apparent purpose of these immunities was to subsidize economic growth by reducing the costs of enterprise. In a parallel development in tort law during roughly the same period, the rise of negligence doctrine overthrew an earlier system of strict liability, the effect of which was substantially to reduce damage judgments paid by enterprise and to require that those injured by the process of industrialization bear the cost of their own injuries. The natural right to recover at common law for an injury voluntarily caused by another was thus overthrown by a new system of legal doctrine that justified the sacrifice of individuals by the greater value of collective goals. Thus, in many areas of the law the very definition of property and entitlement was changed judicially in order to promote economic enterprise. By the time of the Civil War, it was increasingly difficult to believe that property was not the creature of legal rules and social policy.[6]

Even in contract law, that seemingly most perfect expression of an individualist, natural rights philosophy, the efficiency demands of the market—the social interest in legal certainty and predictablility—began to overwhelm the postrevolutionary emphasis on enforcing the individual wills of the parties. Not only did bankruptcy legislation, as we have seen, substantially erode the revolutionary view of contract as the enforcement of presocial autonomous individual wills, but a more total subversion of this philosophy took place because of the need for standardization in increasingly impersonal national markets. Beginning in the 1850's, contract doctrine moved away from its concern with enforcing the subjective wills of the parties and shifted

[6] Morton J. Horwitz, The Transformation of American Law 1780-1860, at ch. 3 (1977).

to an objective theory, which gave judges greater discretion to advance legal certainty and predictability at the expense of the particular wishes of the contracting parties. Indeed, objectivism, which became the dominant tendency in all of American law after the Civil War, served as a major means of introducing social policy almost unnoticed into American private law.

We are now in a position to understand the basic contradiction within American legal thought one hundred years after the Revolution: how to reconcile its original legalist attitude towards law with the persistent practice of using law to advance substantive economic policies? How, in short, to maintain the originally sharp distinction between law and politics on which its antiredistributive ideology was founded in the face of repeated instances of the political uses of law? How to preserve the original conception of adjudication as the simple process of deciding between the rights of individual litigants according to the justice of the particular case, given an increasingly utilitarian conception of legal rules that often permitted the sacrifice of individual claims on the basis of social interests?

By the time Henry George wrote, the internal coherence of the post-revolutionary conception of law had begun to come apart. Was it any longer possible to insist upon a neutral legal process that simply enforced individual rights without reference to consequences? And if substantive outcomes were now relevant, why wasn't it appropriate for the law directly to foster equality? After all, hadn't the legal system for the past hundred years already promoted a massive redistribution of wealth in the process of subsidizing economic growth?

During the next fifty years, those legal thinkers who wished to avoid an egalitarian program devoted the bulk of their energies to dealing with these questions. The main issue, of course, was whether private law was indeed private—that is, whether it simply involved private dispute settlement or whether it also legitimately involved the promotion of more general social goals and policies.

How could legal thought succeed in maintaining the separation between law and politics in the face of ever more articulate challenges to the legal system for maintaining and supporting a system of economic inequality?

From the late nineteenth century until the rise of legal Realism in the 1920s, the central preoccupation of legal theory was with attempting to suppress these contradictions. Since the Revolution, legal thinkers had stressed that the legitimacy of the common law system of adjudication depended on limiting its function to the vindication of private right. But by now the very definitions of private right had come to rest more and more upon determinations of social utility. And once calculations of utility entered the picture only a thin layer of concepts stood between utilitarianism and egalitarianism.

Almost from the beginning, English Utilitarians realized that if one were permitted to make the common sense assumption of a decline in the marginal

utility of money, then maximization of utility required redistribution from rich to poor. What eventually checked this unsettling line of reasoning was the additional assertion that there was no scientific way of comparing utilities among individuals; in short, that one could say nothing about the subjective value of the last dollar received by Paul Plutocratic as compared to Peter Peasant.

But at the same time as the dogma of the incommensurability of interpersonal utilities captured orthodox economic thought, the law was of necessity moving in precisely the opposite direction. To cite only one example, the developing law of damages in the nineteenth century was increasingly built on the assumption that uniform and objective standards should be required—that is, that wherever possible the measurement of damages should be determined by deindividualized, depersonalized, and standardized criteria in order to render them uniform and predictable.

A larger and larger portion of American law during the late nineteenth century thus turned towards objective and external legal standards, which carried the disturbing message that, at least for public acts, it was necessary to assume more or less identical utility functions for all individuals. Objectivization of legal doctrine—an inevitable consequence of the need for standardization in a complex society—thus also undermined the radically individualistic assumptions that had previously stood between utilitarianism and egalitarianism.

By the time Henry George wrote *Progress and Poverty,* it had just begun to dawn on Americans that a predictable pattern of economic depressions had become established during the nineteenth century. The business cycle had periodically produced vast wretched armies of unemployed workers, consisting largely of the most economically vulnerable members of the society. These developments began slowly to undermine what had previously been one of the paramount conditions for social stability in America—a pattern of economic growth which, by generating substantial increases in material wealth, was able to justify growing inequality by pointing to some absolute improvement in everybody's lot. While a few might receive extraordinarily disproportionate shares, almost everyone, it was at once pointed out, could participate in some of the benefits of increasing abundance.

Along with the seeming inevitability of depressions, a second major change had transformed the landscape by the time George wrote. The closure of the frontier and the end of cheap land severely undercut the possibilities of social mobility on which the earlier American ideal of equality of opportunity so heavily depended.

Finally, many of George's contemporaries began to notice that the first stages of a movement towards massive industrial concentration was underway which also subverted the social reality on which the earlier American ideal of social justice had rested.

For the revolutionary generation, property was still justified as the legitimate benefit due to one's own labor. It was regarded as an important expression of individual personality, as it assured a significant measure of autonomy against a potentially coercive state. The widespread availability of property thus not only moderated inequalities, but it also permitted a system of economic and political decentralization. But how could private property still be legitimated in an economic system that was becoming increasingly centralized? How could the individualistic underpinnings of the revolutionary idea of property still be maintained amid the collectivization of corporate enterprise? Could private ownership of property any longer plausibly assure widespread individual autonomy or was it now simply a code word for domination by the wealthy and the powerful? And could a legal system predicated on a conception of protecting individual entitlements coexist with a political system more and more obviously devoted to serving large aggregations of wealth?

By the end of the nineteenth century, Americans, for the first time in their history were forced to choose sides between the premises of a market system, whose legitimacy depended upon widespread decentralization of economic power, and an increasingly concentrated property system, which every day was more completely undermining the primacy of the market as the legitimate, apolitical institution for distributing benefits.

At the beginning of the nineteenth century, the natural rights justification for property was entirely compatible with a decentralized market economy. Under these circumstances, it was still possible to believe that those who engaged in market transactions possessed relatively equal bargaining power and that the results of the market system would produce a reliable distribution of rewards according to the ability and energy of those who participated. Indeed, the market was thought to be the most powerful institutional expression of the ideal of equality of opportunity.

But could the unorganized laborer or small businessman of the late nineteenth century believe in the postulates of a market economy as he faced the economic power of giant corporations? Could the presumption of equal bargaining power enshrined in so many postrevolutionary legal doctrines continue to be maintained within a social reality that regularly exploded its premises? Could one continue to be agnostic about the outcomes decreed by the market when increasing concentrations of economic power subverted the very foundation of that decentralized market system? It was thus necessary to choose between an unregulated property system and an unregulated market system. It was here that an already strained and internally contradictory legal ideology completely came apart during the early years of this century.

The legal ideology that grew out of the American Revolution, we have seen, insisted on the paramount legitimacy of process. It was impermissible for results arrived at through presumptively free and equal bargaining in a decentralized market economy to be reexamined by any substantive mea-

sures of social justice. The legal system was therefore supposed to serve simply as a reflection of the basic processes of a market regime. Any redistribution of wealth through the legal system was thus contrary to its supposedly nonpolitical, non-result-oriented character. But once the monopolistic structure of the market could no longer plausibly be seen as assuring equal opportunity, the earlier efforts to separate means from ends and processes from outcomes began to unravel. For it was becoming no longer possible to avoid the question of the fairness of the consequences.

Radical reformers thus raised the banner of distributive justice only after the economic and political assumptions of the American Revolution had begun to disintegrate. Natural rights individualism—the theoretical foundation of legalism—became increasingly anachronistic amid a collectivized system of property. Even the defenders of the new economic order were forced to turn completely to utilitarian-efficiency justifications of that system. But unlike their predecessors, they were no longer able even to postulate that all would begin the race relatively equally. What the revolutionary generation had once called the study of political economy had, by the end of the nineteenth century, become the modern science of economics. Because it was a science, its practitioners argued, they could say nothing about the inherently subjective and political question of distributive justice.

Thus it was that John Stuart Mill and Alfred Marshall, both of whom sympathised with the egalitarian ideals of socialism,[7] were able to leave disciples who no longer claimed to have anything to say about problems of distributive justice. The result was that on the one hand, orthodox academic thought abandoned the field and left the basic questions of social justice to those by and large least able to think systematically about them. Ironically, the most prestigious thinkers would become those who had least to say about classical problems of substantive justice. On the other hand, by fully acknowledging that such questions were outside the legitimate realm of economic science, these thinkers actually liberated nonspecialists who wished to consider these questions anew. As a result, during the past fifty years the issue of distributive justice has been slowly forcing its way to the forefront of consciousness.

But what will be the fate of those eighteenth-century ideals of the rule of law at the hands of those who in this century seek to restore the primacy of

[7] Mill's conversion to socialism is well known. For an interesting, if ungenerous, psychological account of his movement towards socialism between the first and second editions of the Principles of Political Economy, see Gertrude Himmelfarb, Victorian Minds 134-38 (1968).

Joseph Schumpeter points out that "Marshall professed himself in sympathy with the aims of socialism and spoke without explanation and qualification of the 'evils of inequality' . . . ." History of Economic Analysis 765 (ed. from ms. by Elizabeth Schumpeter 1954). Lord Keynes also wrote of Marshall's "strong sympathy with socialistic ideas," but, "[i]n truth," he concluded, "he sympathised with the Labour Movement and with Socialism (just as J. S. Mill had) in every way except intellectually." John Maynard Keynes, Essays in Biography 186, 194 (Geoffrey Keynes ed. 1954).

erally correct, I think, in seeing a historical relationship between the rule of law and a nonconsequentialist legal and political ethic that ignored the questions of distributive justice? Conservative thinkers like Hayek are gen-distributional question.[8] Is it therefore possible any longer to maintain the legalist mentality with its exaltation of process over outcome and form over substance once men's minds turn directly to the question of substantive justice? For doesn't the rule of law still heavily depend upon eighteenth-century conceptions of natural rights against the state to provide guarantees of individual autonomy? How, in short, is it possible any longer to maintain the rule of law without its eighteenth-century foundations in individualist, natural rights thinking?

It is clear, therefore, that the rule of law, as we have known it for more than two hundred years, is confronting its most basic challenge in the contemporary bureaucratic and regulatory state. But if we look to those responsible for our present predicament, we should take care not to misinterpret history. Throughout our history those who have advocated an instrumental and utilitarian conception of law have been all too willing to erode the constraints of legality while promoting their own visions of allocational efficiency. Indeed, they were at the forefront of those ready to proclaim economic growth as a justification for destroying entitlements once claimed to be based on natural right. It was these judges and jurists who contributed to undermining the autonomy of legal ideas which was the main revolutionary contribution to the ideal of rule of law. And those who at the turn of this century defended the destruction of a decentralized economic system under the then supposed truth of increasing returns to scale are equally responsible for having eroded the institutional foundations on which traditional notions of the rule of law depended. In short, it was only after the institutional and intellectual premises that underlay the late eighteenth century's idea of the rule of law had already been substantially ignored that the heirs of Henry George began to claim that the rule of law was used simply to defend an unjust economic system.

It is too late in the day to return completely to a nonsubstantive, process-oriented ideal of justice. The autonomy of legal doctrine and legal reasoning has largely collapsed during the past fifty years under the cumulative assaults of the problems of late industrial society. It is thus mere nostalgia and anachronism to insist that we must banish all substantive ideals of social justice because they threaten what remains of an earlier conception of the rule of law.

Our task instead is to try to recreate the ideal of legality anew. Torn from its eighteenth century agrarian roots in an individualist, natural rights philosophy, separated from its nineteenth century connections to a decentralized political and economic system, can it revitalize itself within cen-

[8] F. A. Hayek, The Constitution of Liberty 231-33 (1960).

tralized economic and political institutions, which also occasionally subscribe to substantive ideals of distributive justice?

After two hundred years we have finally begun to understand that there can be no law without justice and no justice without law. Whether we can institutionalize this insight is the task that remains before us.